

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, *et al.*,
Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, *et al.*,

Defendants-Respondents.

CASE NO. 2:18-CV-928

**AGREEMENT
REGARDING
DISCOVERY OF
ELECTRONICALLY
STORED
INFORMATION AND
[PROPOSED] ORDER**

[The italicized portions below set forth guidance and instruction to the parties in formulating their agreement but may be deleted from the text of the final agreement as adopted.]

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality

1 standard in discovery, requests for production of ESI and related responses should be reasonably
2 targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 45 days after the date of submission of this order, or at a later time if
5 agreed to by the parties, each party shall disclose:

6 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,
7 custody or control. The custodians shall be identified by name, title, connection to the instant
8 litigation, and the type of the information under his/her control.

9 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,
10 servers, etc.), if any, likely to contain discoverable ESI.

11 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
12 discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage, etc.)
13 and, for each such source, the extent to which this information is within the custody and control
14 of the party.

15 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
16 (by type, date, custodian, electronic system or other criteria sufficient to specifically
17 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
18 P. 26(b)(2)(B). [*Section (C)(3)(a)(i) below sets forth data sources and ESI which are*
19 *not required to be preserved by the parties. Those data sources and ESI do not need to be*
20 *included on this list.*]

21 **C. Preservation of ESI**

22 The parties acknowledge that they have a common law obligation to take reasonable and
23 proportional steps to preserve discoverable information in the party’s possession, custody or
24 control. With respect to preservation of ESI, the parties agree as follows:

25 1. Absent a showing of good cause by the requesting party, the parties shall not be
26 required to modify the procedures used by them in the ordinary course of business to back-up

1 and archive data; provided, however, that the parties shall take reasonable steps to preserve all
2 discoverable ESI in their possession, custody or control.

3 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
4 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
5 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-
6 (2) below or otherwise privileged).

7 3. Absent a showing of good cause by the requesting party, the following categories of
8 ESI need not be preserved:

- 9 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 10 b. Random access memory (RAM), temporary files, or other ephemeral data
11 that are difficult to preserve without disabling the operating system.
- 12 c. On-line access data such as temporary internet files, history, cache, cookies, and
13 the like.
- 14 d. Data in metadata fields that are frequently updated automatically, such as last-
15 opened dates (see also Section (E)(5)).
- 16 e. Back-up data that are substantially duplicative of data that are more
17 accessible elsewhere.
- 18 f. Server, system or network logs.
- 19 g. Data remaining from systems no longer in use that is unintelligible on the systems
20 in use.
- 21 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
22 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
23 that a copy of all such electronic data is routinely saved elsewhere (such as on a
24 server, laptop, desktop computer, or "cloud" storage).

25 *[The parties should confer regarding any other categories of ESI that may not need to be
26 preserved, such as text messages and social media data, in light of the General Principles
set forth above, and determine whether they can agree that such categories can be added to the
non- preservation list above.]*

24 **D. Privilege**

25 *[The parties should confer regarding the nature and scope of privilege logs for the case,
26 including whether categories of information may be excluded from any logging requirements and*

1 *whether alternatives to document-by-document logs can be exchanged.]*

2 1. With respect to privileged or work-product information generated after the filing of the
3 complaint, parties are not required to include any such information in privilege logs.

4 2. Activities undertaken in compliance with the duty to preserve information are protected
5 from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

6 3. The parties intend to enter into a Fed. R. Evidence 502(d) agreement to govern the
7 clawback of any privileged material which will be separately submitted to the Court.

8 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall include
9 a unique identification number for each document and the basis for the claim (attorney-client
10 privileged or work-product protection). For ESI, the privilege log may be generated using
11 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title
12 and date created. Should the available metadata provide insufficient information for the purpose
13 of evaluating the privilege claim asserted, the producing party shall include such additional
14 information as required by the Federal Rules of Civil Procedure.

15 **E. ESI Discovery Procedures**

16 1. On-site inspection of electronic media. Such an inspection shall not be permitted
17 absent a demonstration by the requesting party of specific need and good cause or by agreement
18 of the parties.

19 2. Search methodology. [*The Court presumes that in the majority of cases, the use of*
20 *search terms will be reasonably necessary to locate or filter ESI likely to contain discoverable*
21 *information.*] The parties shall timely attempt to reach agreement on appropriate search terms, or
22 an appropriate computer- or technology-aided methodology, before any such effort is undertaken.
23 The parties shall continue to cooperate in revising the appropriateness of the search terms or
24 computer- or technology-aided methodology.

25 In the absence of agreement on appropriate search terms, or an appropriate computer- or
26 technology-aided methodology, the following procedures shall apply:

1 a. A producing party shall disclose the search terms or queries, if any, and
2 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
3 parties shall meet and confer to attempt to reach an agreement on the producing party's search
4 terms and/or other methodology.

5 b. If search terms or queries are used to locate ESI likely to contain
6 discoverable information, a requesting party is entitled to no more than 5 additional terms or
7 queries to be used in connection with further electronic searches absent a showing of good cause
8 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
9 requesting party within 14 days of receipt of the producing party's production.

10 c. Focused terms and queries should be employed; broad terms or queries,
11 such as product and company names, generally should be avoided. Absent a showing of good
12 cause, each search term or query returning more than 250 megabytes of data is presumed to be
13 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
14 types.

15 d. The producing party shall search both non-custodial data sources and ESI
16 maintained by the custodians identified above.

17 e. The parties reserve their rights to identify responsive documents through
18 methods other than search terms, to include informed custodial self-identification. "Informed
19 custodial self-identification" means a process by which a document custodian, in consultation with
20 legal counsel, identifies folders, drives, or repositories of documents and/or ESI that are likely to
21 contain materials that are responsive to the Receiving Party's discovery requests.

22 3. Format. The parties agree that ESI will be produced to the requesting party with
23 searchable text, in a format to be decided between the parties. Acceptable formats include, but are
24 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),
25 single-page TIFFs (only with load files for e-discovery software that includes metadata fields
26 identifying natural document breaks and also includes companion OCR and/or extracted text

1 files),and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily
2 converted to image format, such as spreadsheet, database and drawing files, should be produced
3 in native format.

4 4. De-duplication. The parties may de-duplicate their ESI production across
5 custodial and non-custodial data sources after disclosure to the requesting party.

6 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only
7 the following metadata fields need be produced: document type; custodian and duplicate
8 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
9 path; date and time created, sent, modified and/or received; and hash value.

10 **F. MODIFICATION**

11 This Agreement may be modified by agreement of the parties or by the Court for good
12 cause shown.

13 Nothing in this Agreement shall be construed to prohibit the undersigned Parties from
14 agreeing to modify any provision of this Agreement or seeking relief from the Court. Nor shall
15 anything in this Agreement or any Party's compliance be construed as a waiver of any Party's
16 rights under the Federal Rules of Civil Procedure. Nor shall anything in this Agreement be
17 interpreted to require disclosure of information that is not relevant to the claims or defenses in this
18 case or that is protected by any applicable privilege. Nor shall anything in this Agreement be
19 construed to waive any objections as to the production, discoverability, or confidentiality of ESI.
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1 RESPECTFULLY SUBMITTED this April 29, 2019.

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: _____

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2019, I had the foregoing electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

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